

SERVICE DATE – FEBRUARY 19, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35781

BRAZOS RIVER BOTTOM ALLIANCE—PETITION FOR
DECLARATORY ORDER

Digest:¹ The Board is denying a petition by Brazos River Bottom Alliance asking the Board to open a declaratory order proceeding and find that Union Pacific Railroad Company requires Board approval for a rail project in Robertson County, Tex.

Decided: February 18, 2014

On October 24, 2013, the Brazos River Bottom Alliance (BRBA) filed a petition asking the Board to institute a declaratory order proceeding and enter an order finding that Union Pacific Railroad Company (UP) requires approval under 49 U.S.C. § 10901 for its proposed construction of a rail project planned in Robertson County, Tex. In its petition, BRBA seeks both discovery from UP and injunctive relief. On November 13, 2013, UP filed a reply to BRBA's petition, arguing that the construction project, which UP identifies as the Hearne Classification Yard (the proposed yard), is not subject to the Board's licensing requirements under 49 U.S.C. § 10901, but is instead excepted from the need for Board approval under 49 U.S.C. § 10906. On November 27, 2013, the Association of American Railroads (AAR) filed comments in support of UP's position. On November 25, 2013, BRBA filed a motion to compel discovery, to which UP replied on December 16, 2013. On January 16, 2014, BRBA sought to supplement the record by filing a letter further describing its environmental/public safety concerns. On February 5, 2014, UP responded, arguing that BRBA's letter is a prohibited "reply to a reply," but also including a substantive response for consideration in the event that the Board accepts BRBA's letter as a part of the record. We will accept Petitioners' January 16 filing and UP's response in the interest of compiling a more complete record.²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² See City of Alexandria, Va.—Petition for Declaratory Order, FD 35157 (STB served Nov. 6, 2008) (allowing reply to reply "[i]n the interest of compiling a full record"); Denver & Rio Grande Ry. Historical Found. d/b/a Denver & Rio Grande R.R.—Petition for Declaratory Order, FD 35496, slip op. at 3 (STB served Feb. 23, 2012).

For the reasons discussed below, both the request to institute a declaratory order proceeding and the request to compel discovery will be denied.

BACKGROUND

BRBA describes itself as a community group comprised of 50 members, including landowners, tenant farmers, small agriculture-related business owners, and residents of the area on or near the site of the proposed yard.³ The project at issue is located entirely in Robertson County, Tex.⁴ According to BRBA, the project, which it refers to as a “rail facility,” will be located north of the Bryan-College Station area near the community of Mumford, Tex.⁵ The nearest major town is Hearne, which is to the north.⁶ UP states that Robertson County is being considered for the proposed yard because of the area’s strategic location near several existing UP lines and terminals that face capacity constraints.⁷ UP states that its rail lines in Robertson County form a crossroads for traffic flowing north-south and east-west through the triangle formed by Dallas/Ft. Worth, Houston, and San Antonio.⁸

Citing potential environmental, economic, and safety concerns, BRBA maintains that its members will be negatively impacted should UP construct what it describes as the new “rail lines.”⁹ BRBA argues that the proposed yard is subject to the Board’s licensing authority and cannot proceed without Board approval.¹⁰ BRBA notes that UP currently provides extensive rail service in the area, operating seven different “subdivisions” into and out of Hearne and nearby Valley Junction.¹¹ BRBA also points out that the UP rail lines of predecessor railroads International and Great Northern and the Houston & Texas Central intersect near Mumford.¹² It contends, however, that the proposed yard requires Board approval under 49 U.S.C. § 10901 because it will “facilitate” the extension of UP service into new territories and markets.¹³ As support, BRBA submits a marketing plan developed for UP by R.L. Banks & Associates, which,

³ BRBA Pet. 7.

⁴ Id. at 8.

⁵ Id.

⁶ Id.

⁷ UP Reply 5.

⁸ Id. at 5-6.

⁹ BRBA Pet. 7, 12-13.

¹⁰ Id. at 16-31.

¹¹ Id. at 8.

¹² Id.

¹³ Id. at 26-29.

according to BRBA, demonstrates UP's intention to position itself to serve developing markets related to the fracking industry, coal exports, the expansion of the Panama Canal, and certain manufacturing in Mexico.¹⁴ BRBA argues that, because UP's access to these "new markets" is not possible without the proposed yard, construction of the yard is subject to the Board's licensing authority.¹⁵

According to UP, the proposed yard will relieve congestion at other UP terminals, allowing those yards either to better serve local traffic or to support fluid interchange with connecting carriers.¹⁶ UP explains that the proposed yard will be used primarily for breaking up incoming trains, switching and sorting cars into blocks, and building and launching outbound trains.¹⁷ UP anticipates it may also be used for classification support, including car inspection and repair, locomotive servicing and repair, and crew changes.¹⁸ UP states that its existing main lines in Robertson County will continue to carry through trains on existing routes, and the proposed yard will not alter these operations except to the extent that some trains will originate or terminate at the proposed yard and bypass handling at other congested rail yards in UP's southern region.¹⁹ UP maintains that all operations on the tracks of the proposed yard will be incidental to the movement of through trains over existing, adjacent UP main lines.²⁰ UP points out that for track to be subject to § 10901, the track must physically reach a new customer in a territory not previously served and argues that its existing track already serves the areas where the "new markets" identified by BRBA are located.²¹

In its comments in opposition to BRBA's petition, AAR argues that the proposed yard is a classification yard that is not subject to prior Board approval and that the institution of a proceeding in this case would unnecessarily create uncertainty in this area and potentially chill investment in rail infrastructure.²²

Finally, BRBA argues that discovery is necessary in this case in order to learn more details about the proposed yard. In reply, UP argues that there are no relevant factual questions that

¹⁴ BRBA Pet. Ex. A.

¹⁵ Id. 26-29.

¹⁶ UP Reply 6.

¹⁷ Id. at 7.

¹⁸ Id.

¹⁹ Id.

²⁰ Id. at 11.

²¹ UP Reply 12-21.

²² AAR Comments 2-4.

would justify granting discovery, that discovery is normally not allowed in a declaratory order proceeding, and that, in any event, discovery is not allowed until the Board institutes a proceeding.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to terminate a controversy or remove uncertainty. See Boston & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675, 675 (1989). BRBA argues that whether Board authority is required for the proposed yard presents such a controversy. However, institution of a declaratory order proceeding is not warranted here, as the Board finds no legal uncertainty concerning the status of the proposed yard.

While it is well established that a rail carrier must seek Board authority under 49 U.S.C. § 10901 to construct a new rail line or to extend an existing rail line into a new market, it is equally well established that an existing carrier's construction of ancillary railroad facilities and yard track is excepted from these prior approval requirements pursuant to 49 U.S.C. § 10906. In distinguishing between ancillary track and track used for line haul service, the Board and its predecessor, the Interstate Commerce Commission, have primarily looked to the "intended use" of the track. Nicholson v. ICC, 711 F.2d 364, 367 (1983). Ancillary track is typically used for loading, unloading, switching, and other purposes that are incidental to main-line operations. Id. at 367-68 (citing Detroit & Mackinac Ry. v. Boyne City, 286 F. 540, 546 (E.D. Mich. 1923)).

To constitute an extension of railroad line that would be subject to § 10901, the purpose and effect of the new trackage must be "to extend substantially the line of a carrier into new territory." Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry., 270 U.S. 266, 278 (1926). That is,

[t]rack segments which are intended to be used to carry *through trains* between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the [Board] pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b) [now section 10906].

Nicholson v. ICC, 711 F.2d at 368 (emphasis added).

Ancillary track is excepted from the Board's approval requirements because it does not penetrate or invade a new market but simply augments the capacity of existing main-line operations that are already authorized. Id.²³

Here, the intended use of the proposed yard—for breaking up, switching, and sorting rail cars into blocks, etc.—is clearly ancillary to UP's line-haul service. It will allow UP to increase capacity on its existing lines, but it will not physically penetrate new territory, nor will it reach new customers in an area where UP is not already authorized to perform rail service. Through trains will continue to move over UP's existing main lines to their destinations, and the proposed yard will be incidental to the operation of trains over those lines. Therefore, construction of the proposed yard is excepted from our approval requirements under 49 U.S.C. § 10906. Because we find no controversy or uncertainty regarding the proposed yard, we will deny BRBA's request to institute a declaratory order proceeding.

Finally, in its January 16 letter, BRBA has expressed substantial safety concerns relating to the transport of crude oil by rail. While such issues are important, their existence does not transform a rail operation that does not require authority from the Board under 49 U.S.C. § 10906 into one that does. Moreover, federal agencies other than the STB have been delegated authority over rail safety matters.²⁴

Because we have declined to initiate a proceeding here, BRBA's related request to compel discovery will be denied as moot.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BRBA's petition for declaratory order is denied, and the Board declines to open a proceeding.
2. BRBA's motion to compel discovery is denied as moot.
3. This decision is effective on its service date.

By the Board, Chairman Elliott and Vice Chairman Begeman.

²³ See also Union Pac. R.R.—Pet. for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. between Jude and Ogden Junction, Tex., 3 S.T.B. 646, 651 (1998) (where reactivated track only added capacity to existing operations, approval under § 10901 was not required).

²⁴ Both the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration are responsible for safety issues related to crude oil transport.